

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the matter of:

Paul Armbruster v. T-Mobile U.S.A. Inc.  
AAA Case No: 01-16-0003-4446

CG Docket No. 02-278

Petition for Expedited Declaratory Ruling Regarding  
a Consumers Right to Revoke Consent under the  
TCPA

**EXPEDITED PETITION FOR DECLATORY RULING OR ALTERNATIVELY A RULEMAKING  
REGARDING A CONSUMERS RIGHT TO REVOKE CONSENT TO RECEIVE UNWANTED TEXT  
MESSAGES FROM COMMON CARRIERS**

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## I. INTRODUCTION

Paul Armbruster petitions the Federal Communications Commission (FCC) for an expedited declaratory ruling, or alternately to promulgate new rules, as a result of T-Mobile obtaining an arbitration order (Order) (Exhibit A) holding that they are entirely exempt from liability under the Telephone Consumer Protection Act (TCPA). T-Mobile successfully argued that: 1) because they do not charge their customers for text messages the FCC has exempted them (and all common carriers) from liability under the TCPA; and, 2) that subsequently, Petitioner cannot revoke consent to receive unwanted text messages from T-Mobile. The Order aligns exactly with what T-Mobile has argued during the arbitration proceedings – that they are entirely exempt from TCPA liability. The Order also supports the notion that every single cell phone user in the United States is subject to unlimited text messages from their service provider for which they cannot revoke consent or otherwise opt-out – all with the blessing of the FCC. Unlimited messages, containing any content, into eternity. This is absurd and is entirely inconsistent with the objectives of the TCPA and prior FCC decisions.

## II. BACKGROUND

Petitioner is a T-Mobile customer and at a certain point in 2015 began to receive text messages from T-Mobile advertising products like, T-Mobile's "gift finder" for father's day, and "T-Mobile LG tablet offer."<sup>1</sup> Text messages from T-Mobile came from 3 numbers; first from 459, then 456, and finally from 1(56). Petitioner has responded "stop" and "Stop" and "STOP" to all of these numbers. Petitioner has called T-Mobile customer support where he was told that he cannot opt-out because "the FCC requires T-Mobile to send the messages." Finally, Petitioner pleaded with Mr. Derin Dickerson from Alston Bird,

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<sup>1</sup> See Exhibit F and Exhibit G for examples of text messages from T-Mobile.

counsel for T-Mobile, to please stop the messages, his response was... “No – T-Mobile is exempt from the TCPA and is not required to stop.” As such, and to this day, Petitioner continues to get unwanted text messages from T-Mobile.

Petitioner filed suit claiming TCPA violations in Arizona Justice Court in June 2016, this action was dismissed and removed to arbitration pursuant to the binding arbitration clause in the Terms and Conditions of the T-Mobile User Agreement. Petitioner initiated arbitration and completed the AAA online complaint form on August 16, 2016. On September 7, T-Mobile filed their Answer (Exhibit B); Petitioner filed an Amended Complaint also on September 7 (Exhibit C). The Arbitrator, Ms. Maria Speth, from Jarburg Wilk in Phoenix, scheduled a telephonic hearing on November 7 and this resulted in T-Mobile filing a Motion for Summary Judgment on November 21 (Exhibit D), and Petitioner filing an Opposition to that motion and Petitioners Motion for Summary Judgment on November 23 (Exhibit E). Ms. Speth granted T-Mobile’s MSJ on December 29, 2016 supporting T-Mobile’s position that they are absolutely exempt from any liability under the TCPA and their customers cannot opt-out of receiving unwanted text messages. (Exhibit A)

### III. Discussion

In her Order (Exhibit A) Ms. Speth concludes that “nothing in the FCC rules or the case law provided to the undersigned arbitrator prohibits communications from a wireless carrier to its customer after the customer expresses that he does not want to receive such communications.”<sup>2</sup> This is nonsensical. The FCC July 2015 Omnibus Declaratory Ruling and Order could not have been more clear in that,

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<sup>2</sup> See Exhibit E for the arguments made by Petitioner as well as the FCC rules, orders, and case law provided to the arbitrator. Petitioner makes essentially the same arguments in the present matter, that is, revocation of consent is absolute and the “common carrier exemption” theory to a consumer’s right of revocation put forward by T-Mobile, and accepted by Ms. Speth, does not exist.

“Consumers may revoke consent at any time and through any reasonable means” (p5) and that “without a method for revoking consent, consumers would effectively be locked in at a point where they no longer wish to receive such communication.” (§ 57 citing the *Anda Order*). This is the position Petitioner currently finds himself, that is, the acceptance of unwanted text messages is now a condition of his T-Mobile service.

T-Mobile’s misguided theory relies on comments made by the FCC in 1992.

“Based on the plain language of § 227(b)(1)(iii), we conclude that the TCPA did not intend to prohibit autodialer or prerecorded message calls to cellular customers for which the called party is not charged. Moreover, neither TCPA nor the legislative history indicates that Congress intended to impede communications between radio common carriers and their customers regarding the delivery of customer services by barring calls to cellular subscribers for which the subscriber is not called. Accordingly, **cellular carriers need not obtain additional consent** from their cellular subscribers **prior** to initiating autodialer and artificial and prerecorded message calls for which the cellular subscriber is not charged.”

(Exhibit A, citing *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752 (1992)) Emphasis added

T-Mobile successfully argued that because cellular carriers, “need not obtain additional consent” this meant: 1) consumers could not revoke consent - because consent is never needed by a cellular carrier; and, 2) common carriers are therefore immune from TCPA liability as it relates to their customers. Again, this is absurd. The record is clear that subsequent to these comments – made nearly 25 years ago – the FCC clarified that the exemption only applies to the need for “prior express consent” before sending certain messages. T-Mobile has hoodwinked the arbitrator by conflating the concept of a “prior express consent” exception with a consumer’s ability to revoke consent.

A. THE 1992 STATEMENTS RELATE TO THE NEED FOR “PRIOR EXPRESS CONSENT” NOT AND EXEMPTION FROM REVOCATION. THIS WAS RECONFIRMED IN 2012.

In 2012 the FCC clarified the “prior written consent” exception by expressly recognizing a customer’s right to revoke consent.

10. **Calls Not Subject to Written Consent Requirement.** While the Commission adopts rules to protect consumers from unwanted telemarketing robocalls, it leaves undisturbed the regulatory framework for certain categories of calls. Specifically, consistent with section 227(b)(2)(C) of the Act and its implementing rules and orders, the **Commission does not require prior written consent** for calls made to a wireless customer by his or her wireless carrier if the customer is not charged. One commenter requests that the Commission clarify that wireless carriers may send free autodialed or prerecorded calls, **including text messages**, without prior written consent, if the calls are intended to inform wireless customers about new products that may suit their needs more effectively, **so long as the customer has not expressly opted out of receiving such communications.** As noted above, the Commission addressed this issue in the *1992 TCPA Order*, published at 57 FR 48333, October 23, 1992, by concluding that Congress did not intend to prohibit autodialed or prerecorded message calls by a wireless carrier to its customer when the customer is not charged. The Commission based its conclusion on the fact that neither the TCPA nor its legislative history indicates that Congress intended to impede communications between common carriers and their customers regarding the delivery of customer services by barring calls to wireless

consumers for which the consumer is not charged. Nothing in the record or the Commission's analysis of consumer complaints provides it a reason to alter its finding.

47 CFR Part 64; CG Docket No. 02-278; FCC 12-21 (Emphasis added)

## B. THE 2012 ROBOCALL REPORT AND ORDER – COMMENTS BY T-MOBILE

T-Mobile is well aware of their obligations under the TCPA yet under the veil of arbitration they posit a theory that directly contradicts the representations they have previously made to the FCC.

Paragraph 27 of the 2012 Robocall Report and Order is entitled "Calls Not Subject to Written Consent Requirement." Midway through paragraph 27 the Commission states;

"One commenter requests that the commission clarify that wireless carriers may send free autodialed or pre-recorded calls, **including text messages**, without prior written consent, if the calls are intended to inform wireless customers about new products that may suit their needs more effectively, **so long as the customer has not expressly opted out of receiving such communications.**" (emphasis added)

The commenter referred to by the FCC is T-Mobile (Robocall Report and Order ¶ 27 and fn. 70). T-Mobile appears in front of the FCC in order to influence rulemaking and offers comments that would lead the Commission to believe T-Mobile complies with opt-out requests, yet in reality: 1) they do not action any opt-out requests; and, 2) they push consumers who complain into binding arbitration where, out of public view, argue they are entirely exempt from such obligations.

#### IV. Conclusion

The FCC has made it abundantly clear that “Consumers may revoke consent at any time and through any reasonable means” and they have not offered cellular carriers an exemption from this obligation.

Concurrently, Petitioner has filed a Motion for Reconsideration with the AAA and respectfully requests expedited ruling and/or action on the below:

- A ruling confirming that a cellular phone customer can revoke consent to receive any and all unwanted text messages from their service provider;
- A ruling confirming cellular or common carriers are not exempt from the TCPA;
- A ruling that clarifies the “prior express consent” exception offered to cellular carriers;
- An order instructing T-Mobile to cease sending Petitioner text messages;
- Referral of this petition to the FCC Enforcement Bureau for further investigation and action.

This 20<sup>rd</sup> day of January, 2017

/s/ Paul Armbruster

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